UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

NATHANIEL MANNY BALLANTYNE, Plaintiff, v. GUENTHER MANAGEMENT LLC DBA GUENTER PROPERTY MANAGEMENT, VICTOR M, HUBERTUS GUENTHER, MISCHA GUENTER, ERICH GUENTER, SERGEY KHOLOSTOV, Defendants.	NO. 2:24-CV-0085-TOR ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

BEFORE THE COURT is Defendants' Motion for Summary Judgment (ECF No. 22). This matter was submitted for consideration without oral argument. The Court has reviewed the record and files herein and is fully informed. For the reasons discussed below, Defendants' Motion for Summary Judgment (ECF No. 22) is GRANTED.

BACKGROUND

This matter arises out of alleged discriminatory rental practices. Around December 18, 2023, Plaintiff arranged a showing of a property he was interested in renting at 1606 E. 65th Avenue in Spokane, Washington. ECF No. 24 at 2, ¶ 9; ECF No. 29 at 2, ¶ 6. Plaintiff toured the property and submitted an application to rent the property on December 19, 2023. ECF No. 24 at 2, ¶¶ 9, 11; ECF No. 29 at 2, ¶ 7. Violet Obonyo was Plaintiff's co-applicant. ECF No. 23 at 3. After some period of time, Plaintiff reached out to Defendant Guenther Property Management, enquiring whether the renting requirements had changed for the property he had submitted an application for, specifically whether the credit score requirement had increased from 600 to 700. ECF No. 24 at 3, ¶ 12; ECF No. 29 at 2–3, ¶ 14. The email expressed Plaintiff's belief that the posting for the rental property had been changed after he had submitted his application to create a basis for denying him the rental because he is black. ECF No. 3 at 3–4, ¶ 7. A representative from Defendant Guenther Property Management responded, informing Plaintiff that the credit score requirement for the at issue property was always 700, and that another prospective renter had submitted an application earlier than Plaintiff, and thus had been approved based on a "first come first serve," policy. ECF No. 24 at 3, ¶ 12; ECF No. 29 at 2–3, ¶ 14.

The parties disagree as to the timing of the criteria in the posting and

whether another prospective tenant submitted an application before Plaintiff. Plaintiff contends that Defendant Guenther Property Management's requirement for credit score in the emailed policy and in the listing for the rental property was always 600 and was only made to be 700 after he applied. ECF No. 29 at 2–3, ¶¶ 9, 15, 19. He also disputes that another prospective renter submitted an application before he did, and argues that he was never made aware of a "first come first serve," policy. *Id.*, ¶¶ 13, 14, 16, 18. Defendants argue that Plaintiff was made aware of the pending background check and credit score requirement, which was 700 for this particular property, at the time of application. ECF No. 24 at 2, ¶ 10; ECF No. 36 at 3, ¶ 6. Moreover, Defendants argue that a renter who submitted an application on December 17, 2023, two days before Plaintiff, was ultimately approved as essentially the first in line for the rental. ECF No. 24 at 3, ¶ 12; ECF No. 36 at 2–4, ¶¶ 1, 3, 5. Defendants also assert, and Plaintiff refutes, that the individual who was approved to rent the property was black. ECF No. 29 at 3, ¶ 17; ECF No. 36 at 2, ¶ 4. The parties disagree as to whether Plaintiff was actually denied as a renter for the property. ECF No. 29 at 2–3, ¶ 15; ECF No. 36 at 2, ¶ 2.

Plaintiff filed this lawsuit on March 18, 2024, bringing claims of violations of 42 U.S.C. § 3604, the Fair Housing Act, violations of various provisions of RCW 49.60, the Washington Law Against Discrimination, Intentional Infliction of Emotional Distress, Negligent Infliction of Emotional Distress, Negligent

Retention, and Negligent Supervision. *See generally* ECF No. 1. Defendants filed a Motion for Summary Judgment, arguing that Plaintiff's application was not denied on the basis of race, and in fact, was never denied at all. ECF No. 23 at 5. Plaintiff opposes, arguing that questions of fact still remain because Defendants have not provided adequate proof that someone submitted an application before he did, and they did not change that credit requirement for the property after he submitted an application.[1] ECF No. 33 at 1.

DISCUSSION

I. Summary Judgment Standard

The Court may grant summary judgment in favor of a moving party who demonstrates "that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In ruling on a motion for summary judgment, the court must only consider admissible evidence. *Orr v. Bank of America*, NT & SA, 285 F.3d 764, 773 (9th Cir. 2002). The party moving for summary judgment bears the initial burden of showing the

[1] The Response to the Motion for Summary Judgment was filed before the Court denied Plaintiff's request for sanctions related to discovery. ECF No. 34. To the extent that Plaintiff makes arguments as to prejudice he has faced in discovery here, the Court relies on its prior Order.

absence of any genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then shifts to the non-moving party to identify specific facts showing there is a genuine issue of material fact. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). "The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Id*. at 252.

For purposes of summary judgment, a fact is "material" if it might affect the outcome of the suit under the governing law. *Id*. at 248. Further, a dispute is "genuine" only where the evidence is such that a reasonable jury could find in favor of the non-moving party. *Id*. The Court views the facts, and all rational inferences therefrom, in the light most favorable to the non-moving party. *Scott v. Harris*, 550 U.S. 372, 378 (2007). Summary judgment will thus be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322.

II. The Fair Housing Act

Plaintiff brings claims relating to disparate impact and intentional discrimination under 42 U.S.C. § 3604(a)–(b) in refusing to rent him the property. ECF No. 1 at 23–26. The Fair Housing Act makes it unlawful to refuse to "rent after the making of a bona fide offer, or to refuse to negotiate . . . the rental of, or

otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a). And prohibits discrimination "against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(b). Fair Housing Act claims may be brought under theories of both disparate treatment and disparate impact, or both. *Comm. Concerning Cmty. Improvement v. City of Modesto*, 583 F.3d 690, 711 (9th Cir. 2009).

A. Disparate Treatment

The Ninth Circuit analyzes disparate treatment claims under Title VII's three-stage *McDonnell Douglas/Burdine* test. *Gamble v. City of Escondido*, 104 F.3d 300, 305 (9th Cir. 1997) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)) (citing *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981). The plaintiff must first establish the prima facia elements of a disparate treatment claim, here including: (1) the plaintiff is a member of a protected class; (2) the plaintiff applied for and was qualified to rent a property; (3) the defendant denied the rental property to the plaintiff; and (4) a similarly situated party was treated differently. *See Gamble*, 104 F.3d at 305; *Soules v. U.S. Dep't of Hous. & Urban Dev.*, 967 F.2d 817, 822 (2d Cir. 1992); *see also Harris v. Itzhaki*, 183 F.3d

1043, 1051 (9th Cir. 1999) ("Adapted to this situation, the prima facie case elements are: (1) plaintiff's rights are protected under the FHA; and (2) as a result of the defendant's discriminatory conduct, plaintiff has suffered a distinct and palpable injury."). If the plaintiff proves his or her prima facia case, under the burden shifting framework, the defendant must articulate a legitimate, nondiscriminatory reason for its action. *Budnick v. Town of Carefree*, 518 F.3d 1109, 1114 (9th Cir. 2008). The burden then shifts back to the plaintiff to establish by a preponderance of the evidence that the defendant's asserted reason is pretext for discrimination. *Id*.

Neither party contests that Plaintiff, as a black man, satisfies the first element of the prima facia test. ECF No. 1 at 3, ¶ 11. However, Plaintiff is unable to establish or rebut Defendants' evidence with regard to the second, third, and fourth elements. He argues that at the time of application for the rental property, the credit score requirement on the listing was 600, and both he and his co-applicant had credit scores that qualified them for the property. ECF No. 1 at 16, ¶ 68; ECF No. 29 at 3, ¶ 19. Defendants raised the minimum credit score requirement from 600 to 700 on the property after he applied, he argues, and this practice is disparate treatment under the Fair Housing Act. ECF No. 33 at 7. Plaintiff leaves unrebutted Defendants' produced online management log that depicts, at the time of posting the property for rent online on December 8, 2023, a

listing with a stated credit score requirement of 700. ECF No. 24-2 at 8. At the time of application, Plaintiff states that he had a credit score of 620 and his co-applicant had a credit score of 698, making them both unqualified for the rental listing and therefore unable to satisfy the second element of the test. ECF No. 33 at 3.

More importantly, pursuant to Defendants' email, Plaintiff was not denied based on the credit score requirement, but instead the property was not available because someone else had submitted an application before him and had been approved first. ECF No. 33-2 at 3. Defendants provided a timestamped log of the application submission on December 17, 2023, and Plaintiff's application on December 19, 2023. ECF No. 24-2 at 6. Plaintiff's Response ignores this production. ECF No. 29 at 2, ¶ 13. Thus, even if Plaintiff had the requisite credit score, he was not the most qualified applicant as he was not "first in line" for the property and cannot satisfy the third element. Finally, Defendants also argue that the person who submitted the application on December 17 was black, and proffer Plaintiff's own testimony as support. *See* ECF No. 36 at 2, ¶ 4; ECF No. 24-3 at 10. Plaintiff does not rebut the contention directly. *See* ECF No. 29 at 3, ¶ 17. Plaintiff has failed to prove his prima facia case or rebut the evidence that Defendants did not engage in discriminatory conduct, and therefore summary judgment is proper.

B. Disparate Impact

Plaintiff's theory of disparate impact centers on the historically lower credit scores of black and Hispanic rental applicants, and therefore argues that Defendants' credit score requirement has a disparate impact. ECF No. 1 at 24–25. He also seemingly argues that Defendants have manufactured their "first come first serve," policy to the detriment of protected class members applying, though the theory is not mentioned in his Complaint. See ECF No. 30 at 3. Both claims fail.

Disparate impact claims are subjected to the same burden shifting framework as is discussed for disparate treatment. *Ojo v. Farmers Grp., Inc.*, 600 F.3d 1201, 1203 (9th Cir. 2010). The prima facia elements require the plaintiff to demonstrate: "(1) the occurrence of certain outwardly neutral . . . practices, and (2) a significantly adverse or disproportionate impact on persons of a particular [type] produced by the [defendant's] facially neutral acts or practices." *Gamble*, 104 F.3d at 306 (citing *Pfaff v. U.S. Dep't of Hous. & Urban Dev.*, 88 F.3d 739, 745 (9th Cir. 1996)). There is a "robust causality," requirement between an identified neutral policy and any alleged disparities that affect members of a protected class, which requires a plaintiff to produce more than just statistical evidence of a causal connection to show that it was the challenged policy, and not some other factor or policy, that caused a disproportionate effect. *Sw. Fair Hous. Council, Inc. v. Maricopa Domestic Water Improvement Dist.*, 17 F.4th 950, 961 (9th Cir. 2021).

In order to establish a disparate impact case, a plaintiff must show, "at least that the defendant's actions had a discriminatory effect." *Keith v. Volpe*, 858 F.2d 467, 482 (9th Cir. 1988) (internal citation omitted). The burden the shifts to the defendant to either rebut the factual underpinnings of the claim or demonstrate nondiscriminatory reasons for the practice causing the disparate impact. *Id*. If a defendant successfully carries the burden, it then shifts back to Plaintiff to show that equally effective alternatives with less discriminatory impacts exists that still accomplish the defendant's legitimate goals. *Inclusive Communities*, 576 U.S. at 533.

Moreover, statutory standing claims under the Fair Housing Act are coextensive with Article III standing. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982). Article III of the United States Constitution vests in federal courts the power to entertain disputes over "cases" or "controversies." U.S. CONST. art. III, § 2. To satisfy the case or controversy requirement, and thereby show standing, a plaintiff must demonstrate that throughout the litigation, they suffered, or will be threatened with, an actual injury traceable to the defendant which will likely be redressed by a favorable judicial decision. *Spencer v. Kemna*, 523 U.S. 1, 7 (1998) (quoting *Lewis v. Cont'l Bank Corp*., 494 U.S. 472, 477 (1990)); *see also Deakins v. Monaghan*, 484 U.S. 193, 199 (1988) ("Article III of the Constitution limits federal courts to the adjudication of actual, ongoing cases or

controversies between litigants."). Three elements must be shown in order to establish Article III standing: (1) the plaintiff must have suffered an "injury in fact" which is both concrete and particularized and not "conjectural" or "hypothetical"; (2) there must be a causal connection between the injury and the conduct complained of; and (3) it must be "likely" as opposed to "speculative" that the injury will be "redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (internal citations and quotations omitted). Regarding the Fair Housing Act disparate impact claims specifically, a plaintiff is not required to be among the class discriminated against in order to have standing. *El Dorado Estates v. City of Fillmore*, 765 F.3d 1118, 1121 (9th Cir. 2014) (quoting *Havens Realty Corp*., 455 U.S. at 378–79).

The Court infers that Plaintiff is arguing that the 600 or 700 minimum credit score requirement is an outwardly neutral policy, as it applies to every applicant who seeks to rent from Defendants. ECF No. 29 at 2, ¶ 9. In his Complaint and in Response to the present motion, Plaintiff offers statistics relating to the credit score and real-estate disparities between black and Hispanic individuals and white individuals. ECF No. 1 at 11, ¶ 41. He presents a report from 2021 detailing that black consumers have a median credit score of 612 and Hispanic consumers have a median credit score of 661, while white consumers have a median credit score of 725. ECF No. 1 at 6, ¶ 25. Also contained in the report, Black and Hispanic

consumers have a disproportionately larger percentage of subprime credit scores. *Id*., ¶ 26. He also offers statistics on the Moran Prairie neighborhood where the rental property at issue is located, including that it is demographically composed of 85.1% white individuals, 2.9% Asian individuals, and 1.6% black individuals, and notes that much of the real estate is owner-occupied and on average is more expensive than neighborhoods around the United States. ECF No. 30 at 1–2, ¶ 4.

What Plaintiff does not include is a causal connection between Defendants' actions and the statistical information. Notwithstanding the fact that Plaintiff was not denied the rental property on account of his own credit score, he does not offer an argument that Defendants' policy disproportionally effects black and Hispanic individuals. Plaintiff does not provide any information relating to how many of Defendants' properties require a credit score greater than 700, how many times a black or Hispanic individual applied for the same unit and were turned down in favor of a white applicant, or whether Defendants manage similar properties in the neighborhood. Instead, Plaintiff relies on conclusory statements that he does not support with evidence, and states generally that credit scores are not the best measurement of rental security. *Gamble*, 104 F.3d at 306 (citation omitted) ("Under the disparate impact theory, a plaintiff must prove actual discriminatory effect, and cannot rely on inference."). Underscoring the point, parties have both presented evidence that Defendants have a baseline credit requirement of 600,

which would encompass not just Plaintiff, but the median credit score of black and Hispanic individuals per the research that Plaintiff has offered. *See* ECF No. 24-5 at 2; ECF No. 33-1 at 3; ECF No. 33-3 at 3; ECF No. 33-4 at 2. And ultimately, evidence has been presented that the at issue property was rented to a black individual, based on Plaintiff's deposition testimony. ECF No. 24-3 at 10 ("I believe . . . the property was rented to an African American gentleman from Kenya. I had spoken to him during my investigation and he basically said when he rented the property . . ."). In sum, Plaintiff offers no link between the statistics he provides and the actions of the Defendants, and the facts of the case do not support the inference he is attempting to draw.

Moreover, Plaintiff's claim that Defendants did not advertise their "first come first serve," policy is nonsensical. There are countless adages that memorialize the sentiment that first in time is first in right, and it only makes logical sense that it is both a fair and good business practice to admit the first qualified individual. Therefore, summary judgment is proper with respect to Plaintiff's disparate impact claim.

III. Washington Law Against Discrimination

Plaintiff does not defend his Washington Law Against Discrimination claims in Response to the present motion, and given his silence and the above findings, they too fail. Both RCW 49.60.030(1)(c) and RCW 49.60.222 prohibit

discrimination in real estate transactions on the basis of race. And RCW 49.60.220 prohibits the practice of aiding, abetting, or encouraging "the commission of any unfair practice, or to attempt to obstruct or prevent any other person from complying with" the Washington Law Against Discrimination. As Washington State also analyzes discrimination claims under the burden shifting framework of *McDonnell Douglas*, summary judgment is proper as to Plaintiff's state law claims. *Marquis v. City of Spokane*, 130 Wn.2d 97, 113 (1996). The elements to prove a prima facia disparate treatment case in Washington largely tract the federal elements. *See Haley v. Pierce Cnty. Washington*, 173 Wn. App. 1017 (2013) ("To prove a prima facie case of race discrimination under WLAD, a plaintiff must show that (1) he is a member of a racial minority; (2) he applied for and was qualified for an available job; (3) he was not offered the position; and (4) after his rejection, the position remained open and the employer continued to seek applicants from other persons with the plaintiff's qualifications."); *Smith v. Brown*, C10-1021 MJP, 2010 WL 3120203, at *6 (W.D. Wash. Aug. 9, 2010) (Referencing RCW 49.60.222, "(1) Plaintiffs have a sensory, mental, or physical impairment that is medically cognizable or diagnosable, (2) Plaintiffs qualify for the housing, (3) Defendants have notice of the impairment and its accompanying substantial limitations, and (4) Defendants failed to affirmatively adopt measures that were available and medically necessary to accommodate the impairment"). The same is

true of a prima facia case for disparate impact. *See State v. City of Sunnyside*, 550 P.3d 31, 50 (Wash. 2024) (internal citation and quotation marks omitted) ("For a disparate impact claim under the WLAD, the plaintiff must prove (1) there is a facially neutral policy or practice and (2) the policy falls more harshly on a protected class.").

Plaintiff has provided no evidence that he did not receive the rental property on account of his race, he was simply not the first person to apply. And likewise, has not provided a causal connection between a credit score requirement and a disparate impact in the ability of members of a protected class to rent property from Defendants. And Plaintiff's claim arising from RCW 49.60.220 is inapplicable given the above findings.

IV. Tort Claims

Plaintiff also leaves his claims of Intentional and Negligent Infliction of Emotional Distress, and Negligent Retention and Supervision undefended in Response. To prove intentional infliction of emotional distress, a plaintiff must show (1) extreme and outrageous conduct; (2) intentional or reckless infliction of emotional distress; and (3) actual result to plaintiff of severe emotional distress. *Kloepfel v. Bokor*, 149 Wn.2d 192, 195 (2003). Though the first element is typically left to a jury, a trial court may decide if reasonable minds could differ as to whether the conduct was sufficiently extreme to result in liability. *Dicomes v.*

State, 113 Wash.2d 612, 630 (1989). In his Complaint, Plaintiff argues that Defendants' manipulation of rental criteria in order to prevent him from qualifying for the property constitutes intentional extreme and outrageous conduct. *See* ECF No. 1 at 35, ¶ 162–63. However, as discussed above, Defendants provided unrebutted evidence that they did not manipulate the posting after Plaintiff applied, nor that Plaintiff was denied on account of his credit score. The inability to rent a property because another individual submitted an approved application first is not outrageous conduct. Moreover, Plaintiff does not articulate a clear framework for his negligent infliction of emotional distress claim in his Complaint, but Washington law has an objective physical manifestation of injury requirement, and he has provided no evidence of physical injury. *Colbert v. Moomba Sports, Inc*., 163 Wn.2d 43, 50 (2008) (citing *Hegel v. McMahon*, 136 Wash.2d 122, 126 (1998)).

Washington law recognizes negligent retention in cases where a plaintiff has shown that an employer knew of an employee's unfitness for their job, or failed to exercise reasonable care when hiring or retaining the employee, and these claims typically arise when the employee is acting outside of the scope of their employment. *Hicks v. Klickitat Cnty. Sheriff's Office*, 23 Wn. App. 2d 236, 248 (2022) (internal citations omitted). And negligent supervision requires a showing that "(1) an employee acted outside the scope of his or her employment; (2) the

employee presented a risk of harm to other employees; (3) the employer knew, or should have known in the exercise of reasonable care that the employee posed a risk to others; and (4) that the employer's failure to supervise was the proximate cause of injuries to other employees." *Briggs v. Nova Servs*., 135 Wn. App. 955, 966–67 (2006), aff'd, 166 Wn.2d 794 (2009) (citing *Niece v. Elmview Group Home*, 131 Wash.2d 39, 48–49 (1997)). Plaintiff's Complaint does not allege that any employee was acting outside the scope of his or her duty. Summary judgement is therefore proper as to Plaintiff's tort claims.

V. Breach of Contract and Unfair Business Practices

In Response to the present motion, Plaintiff includes causes of action for Breach of Contract and Unfair Business Practices, and notes that while the claims do not appear in his Complaint, he intends to seek amendment. ECF No. 33 at 8–10. Raising new theories of liability in response to a motion for summary judgment has been admonished by the Ninth Circuit, and thus these claims are disregarded. *Patel v. City of Long Beach*, 564 Fed. Appx. 881, 882 (9th Cir. 2014) ("As the district court held, a plaintiff cannot raise a new theory for the first time in opposition to summary judgment."); *Coleman v. Quaker Oats Co.,* 232 F.3d 1271, 1292–93 (9th Cir. 2000) ("A complaint guides the parties' discovery putting the defendant on notice of the evidence it needs to adduce in order to defend against the plaintiff's allegations.").

ACCORDINGLY, IT IS HEREBY ORDERED:

1. Defendants' Motion for Summary Judgment (ECF No. 22) is **GRANTED**.
2. Plaintiff's claims are **DISMISSED with prejudice**.

The District Court Executive is directed to enter this Order, furnish copies to counsel, enter judgment in favor of Defendants, and **CLOSE** the file. The deadlines, hearings and trial date are **VACATED.**

DATED May 30, 2025.

THOMAS O. RICE
United States District Judge